

**Art Steel of California, Inc. and Jose A. Calvente  
and Salvador Barrera Ever. Cases 21-CA-  
18143 and 21-CA-18757**

June 22, 1981

**DECISION AND ORDER**

On January 23, 1981, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Art Steel of California, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> We find without merit Respondent's allegation of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge made prejudicial rulings or demonstrated bias against Respondent in his analysis or discussion of the evidence. Furthermore, it is the Board's established policy not to overrule administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

ROGER B. HOLMES, Administrative Law Judge: Based on an unfair labor practice charge filed on August 30, 1979, by Jose A. Calvente in Case 21-CA-18143, and based on an unfair labor practice charge filed on March 6, 1980, by Ever Salvador Barrera in Case 21-CA-18757, the General Counsel issued on April 30, 1980, an amended order consolidating cases, amended consolidated complaint, and amended notice of hearing alleging violations of Section 8(a) (1), (3), and (4) of the Act by Art Steel of California, Inc.

The hearing was held on August 28 and 29, 1980, in Los Angeles, California. Both the counsel for the General Counsel and the representative of the Respondent made closing arguments on the record at the hearing. In addition, the counsel for the General Counsel prepared and filed a post-hearing brief by October 3, 1980.

**FINDINGS OF FACT**

**I. THE EMPLOYER AND THE UNION**

The Board's jurisdiction is not in issue in this proceeding. The Employer is engaged in the manufacture of steel office furniture in Los Angeles, California. The Employer meets the Board's criteria for asserting its jurisdiction under the direct outflow standard.

The status of Sheet Metal Workers' International Association, Local Union No. 170, AFL-CIO, as a labor organization within the meaning of the Act is not in issue in this proceeding. See, for example, the collective-bargaining agreements between the Employer and the Union, which were introduced into evidence as Respondent's Exhibits 2(a) and 2(b).

**II. THE WITNESSES**

In alphabetical order by their last names, the following nine persons appeared as witnesses at the hearing in this proceeding:

*Ever Salvador Barrera* is one of the Charging Parties and alleged discriminatees in this case.

*Jose Cadiz* was a general supervisor for the Respondent on the second shift in August 1979. Cadiz held that position for 2 years.

*Jose Angel Calvente* is one of the Charging Parties and alleged discriminatees in this case. He worked for the Employer for about 2 years. In August 1979, he worked on the paint line on the night shift from 4 p.m. to 12:30 a.m.

*Diana A. Carasco* has been the payroll personnel supervisor of the Respondent for the past 7 years.

*Luis Castillo* had been an employee of the Respondent for about 8 years, and he had been a foreman of the Respondent for over a year. He was laid off by the Respondent on May 9, 1980.

*Monserate Feliciano* has worked for the Respondent for almost 30 years, and he had been the plant manager of the Respondent for approximately 4-1/2 years at the time of the hearing.

*Jose Luis Perez* was a packer on the Respondent's night shift in August 1979. Perez is a member of the Union.

*Richard J. Scott* has been the business manager and the financial secretary-treasurer of the Union since July 1, 1966.

*Jose Pelayo Torres* is an operator on the Respondent's second shift. Torres is a member of the Union, and he was the night shop steward in August 1979.

**III. CREDIBILITY RESOLUTIONS**

In resolving the credibility issues presented in this case, consideration has been given to the demeanor of the witnesses while they testified at the hearing and also to any contradictions and inconsistencies in their version and accounts of relevant matters. The inherent probability and plausibility of their accounts have been weighed in the context of surrounding events.

Both Cadiz and Feliciano were confronted on the witness stand with contradictions between their testimony at the hearing and statements made in their own prehearing

affidavits, which they had earlier given much closer in time to the occurrence of the events.

Cadiz gave his affidavit to a Board agent on the night of September 26, 1979. The affidavit was written in the Spanish language. Portions were translated into English and read into the record. A copy of his affidavit was introduced into evidence as General Counsel's Exhibit 12.

Cadiz was given an opportunity at the hearing to offer an explanation for the apparent contradictions between his hearing testimony and his own prehearing affidavit. In summary, he attributed the differences to errors in his affidavit by the Board agent who took his statement, to his inability to read his affidavit without having his eyeglasses with him at work, and to his preoccupation with his supervisory responsibilities that night when he gave his affidavit.

Feliciano also attributed errors in his prehearing affidavit to the Board agent, who he said was asking questions in English and writing "too fast." He also explained that at the time he gave his affidavit a machine had broken down at the plant and persons were coming into the office to tell him what had happened. He acknowledged that he had made some corrections in his affidavit at that time, and that he had read and signed the statement which was written in the English language. A copy of his prehearing affidavit was introduced into evidence as General Counsel's Exhibit 11. The affidavit was given on September 20, 1979.

Considering the foregoing and the factors mentioned at the outset of this section, I did not find the explanations offered by Cadiz and Feliciano to be convincing. Confidence in the accuracy and the reliability of their accounts is lacking in these circumstances, and I find that I cannot credit their accounts given at the hearing.

With regard to all of the other witnesses who testified at the hearing, I have weighed, evaluated, and accepted their testimony about the facts which were shown to be within their own personal knowledge. In making the findings of fact herein, I will set forth the accounts which are credible, accurate, and reliable, based on the criteria stated at the outset of this section.

#### *A. The Events on Saturday, August 11, 1979*

A copy of the current collective-bargaining agreement between the Employer and the Union was introduced into evidence as Respondent's Exhibit 2(a). The contract became effective on August 11, 1979, although it was not actually signed until November 7, 1979. A copy of the prior contract between the Employer and the Union was received as Respondent's Exhibit 2(b).

Joel H. Jimenez, the assistant business manager of the Union, served as chairman of the Union's negotiating committee during collective-bargaining negotiations with the Employer for the current agreement. At one point, Jimenez had presented the Union's proposals for a new contract to the union members for "pre-ratification" by them. When the union members voted "to pre-ratify the agreement," the Union submitted those proposals to the Employer as the Union's terms for a contract. A strike vote was also taken by the union members. However, the terms ultimately agreed on were not the same as the

proposals. As Barrera testified, "... the vote was taken for a contract, but not the one that the union signed."

On Saturday, August 11, 1979, another union meeting was held at 2 p.m. at the union office. About 150 employees of the Respondent attended that meeting. Included among those employees of the Respondent were Calvente, Barrera, and Perez. In addition, Jimenez was present to speak to the union members about the new contract terms. Also present at that meeting were Bill Barton, who was the assistant plant manager of the Employer at that point in time, and another representative of the Employer from New York.

Jimenez advised the employees of an agreement for a 30-cent-an-hour raise per year for each of the 3 years of the new contract. At that point, Calvente spoke up at the meeting. He testified:

I asked Mr. Jimenez, so that I could clarify the reason why they were giving that miserable amount of 30 cents. When I was talking then Mr. Jimenez tried to cut me off, but other workers complained.

I tried to continue talking but Mr. Jimenez told me that until he gave me the go ahead I could not continue, but I asked for the go-ahead from my co-workers and they told me yes, I could continue talking.

That is when I continued talking and told Mr. Jimenez for what reason he, instead of helping us, the workers, is more for the company.

That is when he tried to cut me off and said that he could not answer any more. That is when he said, when other coworkers tried to talk, that I continued talking trying to explain to him the reason as to why he was discriminating against us, the employees, knowing that we were the ones that had given him the office.

Barrera then spoke up at the meeting and voiced his discontent with the new contract. He also invited the employees to abandon the party which had been prepared for them by Jimenez. Barrera testified: "I told him to keep his beer; that he was used to buying the workers in that way." Barrera stated at the hearing his belief that about 99 percent of the workers did abandon the party.

#### *B. The Events on Monday, August 13, 1979*

On Monday, August 13, 1979, Calvente reported to work as usual at 4 p.m. As Calvente went in the plant to punch his timecard, he saw the Union's assistant business manager, Jimenez, in the supervisor's office with Plant Manager Feliciano, Assistant Plant Manager Barton, and General Supervisor Cadiz. He observed that they were talking, but he could not overhear what was being said.

Barrera also observed Jimenez in the supervisor's office that day. He also saw the same persons as those described by Calvente. He saw that they were talking, but he was not able to overhear what was being said. About 15 or 20 minutes after Jimenez came into the plant, Jimenez spoke to Barrera who was working at the time. Jimenez asked Barrera what his name was. Barrera replied that his name was there where the timecards were. At the hearing, Barrera explained that Jimenez had

taken Barrera's timecard after Barrera had punched in that day. Nevertheless, Jimenez again asked Barrera what his name was, so Barrera told him. Jimenez informed Barrera that he was going to file a charge against him.

Barrera did not receive any warning from the Employer because he stopped working that day and talked with Jimenez.

At the 5 p.m. break on August 13, 1979, Calvente spoke to some employees, and he told them that he was going to make up a list for the employees to sign in order to remove Jimenez from union office. Calvente got some employees to sign such a paper at the 5 p.m. break and again during the 8:30 p.m. dinner period. Calvente continued to solicit signatures during the 11 p.m. break period. He estimated that he obtained 18 to 20 signatures from employees that evening.

### *C. The Events on Tuesday, August 14, 1979*

On Tuesday, August 14, 1979, Barrera telephoned Calvente and asked Calvente to give him a ride to work because Barrera's car was not working. Calvente did so. Barrera inadvertently left a small book in Calvente's car, and Calvente took that book with him into the plant when he reported for work at 4 p.m.

That same afternoon Plant Manager Feliciano called Shop Steward Torres into his office. Present in the office were Feliciano, his secretary, and Torres. An employee named Rosa Semental then came into the office and complained that Calvente had used a "strong word" towards her. Feliciano took a statement from Semental and then she left the office. (See G.C. Exh. 8, which is in Spanish, and see the record where an English translation was read into the record by an interpreter.)

About 4:15 or 4:20 p.m., Supervisor Cadiz approached Calvente and told him that he had to go to the office. Calvente went to the supervisor's office where Plant Manager Feliciano, his secretary, Shop Steward Torres, Supervisor Cadiz, and another supervisor, whose name Calvente could not recall, were present.

Cadiz told Calvente that he had carried a book underneath his arm, and that Calvente "had that book with [him] in order to get signatures to get Mr. Jimenez out of his office." Cadiz described the book as being yellow and of a certain size. Calvente acknowledged that he had carried a small book under his arm and also his lunchbox. He asked for permission to go look for the book.

Cadiz and Calvente then proceeded to Calvente's work area where Calvente showed the book to Cadiz. Calvente also opened his lunchbox and showed Cadiz the contents. Cadiz stated that the book which was shown to him was not "the book." Calvente told Cadiz to look in the area. Cadiz and Calvente were in Calvente's work area for about 4 or 5 minutes. They then returned to the office.

At the office Calvente showed the book to Feliciano to prove that it was not the book which Cadiz had previously described. According to Calvente, at that time Cadiz "... told me that I had said some bad words and I asked which. He said that he had heard that I had told the lady, Dona Rosa, that I had told her a bad word." Calvente asked what the bad word was, and Cadiz told

him. Feliciano told Calvente that he was fired. Calvente asked why, and Feliciano told him "for saying bad words." Calvente said that he wanted more proof, and Feliciano again said that Calvente was fired.

At the hearing, Calvente specifically denied the accusation made by Feliciano in his testimony that Calvente had told him "to go to hell."

Calvente requested permission to go to look for his things. He went back into the plant with Cadiz following. Calvente picked up his lunchbox and, as he was doing so, one of the employees asked Calvente what had happened. Calvente replied that he had been fired. Then Calvente returned to the office and asked Cadiz for a paper in order to file a grievance. Cadiz told him to go to the Union. Calvente left the office.

While Perez was packing a cabinet in the plant, he spoke to Calvente and asked him what was happening. Calvente replied that he had been fired. Perez asked why that had happened. According to Perez, Calvente did not respond "... because at about that time Mr. Jose Cadiz called me and he told me my job was in danger if I continued talking to Jose Calvente because he had just been fired." Perez told Cadiz that he did not care if his job was in danger because Perez had another job. Cadiz then took Perez to the office, and he told Perez to repeat what Perez had said to him in front of Feliciano. Perez did so, and then Perez was told to return to his job.

Other employees also asked Calvente what had happened, and he told them that he had been fired. A person identified only by the name "Vicente" told Calvente that he had to leave the plant and go outside. Calvente did so, where he spoke to some people, and then he went home.

During the 5 p.m. break period that day, the employees discussed having a work stoppage so that the Company would return Calvente to his former job. Perez testified: "... then Jose Cadiz came over and told us that if we did not return to the machines that we could be fired and they could close the factory and if we want to argue something about Calvente to go to the union and talk to Jimenez."

Carrasco described at the hearing the "three-step procedure" for giving written warnings to employees of the Respondent. Those warnings are given for violations of the Company's rules, which are set forth on a large poster at the plant under the heading, "Causes for Disciplinary Action." Because of the size of the poster, portions of the rules were read into evidence. They were: Rule 13, "inattention to duties, loafing, idling, wasting time or sleeping during work hours"; rule 23, "going into other departments or entering restricted areas"; rule 24, "stopping work or making preparations to leave work before signal sounds"; rule 25, "leaving the plant without the supervisor's permission"; rule 30, "insubordination or failure to carry out a work assignment." Unlike violations of the other rules, Carrasco said that insubordination was grounds for dismissal without prior warning.

Calvente acknowledged at the hearing that he had earlier been given a warning for lifting some heavy things, and on other occasions that things would be called to his attention if he was not doing them correctly. Luis Cas-

tillo was the supervisor of Calvente. Castillo was at work on the afternoon that Calvente was fired, but he was not involved in any way in the termination of Calvente. At the hearing, Castillo testified, "One or two weeks before he was fired I just told him that he was not paying too much attention to his job; he would go out to other departments also." Castillo said that he had asked Cadiz to transfer Calvente to another department, but that Calvente was not transferred. Castillo also recalled two persons in the paint department who had complained that Calvente left that department to go elsewhere. He identified one of those employees only by her first name, "Maria," and the other person as being a young man whose name he could not recall.

#### *D. The Events on Wednesday, August 15, 1979*

On Wednesday, August 15, 1979, Barrera and seven or eight other employees of the Respondent went to the union office. They spoke with Assistant Business Manager Jimenez about the termination of Calvente by the Employer. However, Jimenez told the employees that he did not want to talk to any of them.

Introduced into evidence as General Counsel's Exhibit 3 was a photocopy of one of several copies of a grievance which Calvente filed with the Union regarding his termination by the Respondent. The document is dated August 15, 1979. The day shift union steward, Jorge Astasio, signed the grievance form before it was completely filled out. Astasio informed Calvente that Calvente would have to fill in the grievance language, or take the form to a notary public to do so. Calvente then took the form to a notary public, and he told the notary what Calvente wanted to state in the grievance. The notary then wrote in English on the form what Calvente had told him. Calvente had photocopies made of the grievance form. The notary notarized the original copy.

On the same day, Calvente took the grievance to the union office and asked for Jimenez. However, Jimenez was not in the office at the time, so Calvente gave the original copy of the grievance form to one of the secretaries in the union office. (The fact that the original notarized copy was left at the union office for Jimenez was made clear in the record where Calvente stated, "Then I gave the original to Mr. Jimenez.")

A few days later, Calvente telephoned Jimenez and asked about his grievance. Jimenez replied that he had not received any grievance. Next, Calvente filed an unfair labor practice charge against the Union. (See G.C. Exh. 4, which is dated August 30, 1979.)

#### IV. THE INTRAUNION CHARGES FILED AGAINST CALVENTE

The Union's assistant business manager, Jimenez, brought intraunion charges against Calvente. A copy of a letter dated August 17, 1979, was introduced into evidence as General Counsel's Exhibit 2. In pertinent part, it stated:

I Joel H. Jimenez, Assistant Business Manager of Sheet Metal Workers International Association Local Union 170, hereby charge Jose Calvente

membership number 677047 with violating Article Seventeen (17) Sections 1(c), 1(f), 1(k), 1(m).

Sec. 1(c)—Slandering any officer or member of this Association or of any local union or council thereof, verbally or by letter or in printed form, giving public utterance or publicity to any charge, statement or attack on the actions, policies, character, or conduct of any officer or member of this Association or of any local union or council thereof, except in the form of charges properly filed against such officer or member as provided in this Constitution.

Sec. 1(f)—Attempting, inaugurating or encouraging secession from this Association or any local union or council thereof or advocating or encouraging any dual labor movement.

Sec. 1(k)—Failure or refusal to abide by the rules of order and parliamentary procedure in the meetings of a local union or council or creating any disturbance therein.

Sec. 1(m)—Engaging in any conduct which is detrimental to the best interests of this Association or any subordinate unit thereof or which will bring said unions into disrepute.

#### *Statement of Facts:*

Since on or about August 9, 1979, after the ratification meeting of August 8, 1979 of all the employees of Art Steel of California in which 100% of the employees present voted to accept and preratified the proposal of the Union's Negotiations Committee, Brothers Edgar H. Guevara, Ever S. Barrera, Jose Calvente formed a committee by the name of "Committee Anti Racista" and distributed handbills to the members within the plant.

On such handbill they were slandering the Assistant Business Manager and the members of the Negotiating Committee and encouraging a dual labor movement and calling a meeting on the same date that the Assistant Business Manager and the Negotiation Committee called a meeting.

On August 11, 1979, at the meeting held at the Local Union Hall, they disrupted the meeting and insulted the Assistant Business Manager who was presiding at the meeting, slandering him and the Negotiating Committee and creating disturbances and engaging in conduct that is not in the best interests of the Association.

I hereby request that a trial be held in accordance with provisions of the Constitution of Ritual of the Sheet Metal Workers International Association.

Intraunion charges were also filed against Barrera for alleged violations of the Union's constitution and for his conduct at the union meeting on August 11, 1979.

#### *A. Events on Wednesday, September 26, 1979*

About 10:50 p.m. on Wednesday, September 26, 1979, at the plant Barrera observed a woman who was not an employee of the Company. Barrera approached her and

asked "if she belonged to the Labor Commission." Barrera explained that his reason for doing so was that he had been called at his home two or three times, but he had not been able to contact anyone. The woman replied to Barrera affirmatively, and she told him that she was the person. At that moment, Cadiz came over to them and Barrera left. Barrera said that the conversation lasted from 1-1/2 to 2 minutes at the most.

About 11:15 p.m. that same night, Cadiz gave a written warning to Barrera. Barrera testified:

He had a warning prepared for me already. He said that it was definitely prohibited to talk to a government person and I told him that I did not know that she was from the government, but it was my intention to find out if she belonged to the Labor Commission because I needed to get in touch with her.

He insisted that I knew that it was a government [person] and gave me the warning.

A copy of the written warning was introduced into evidence as General Counsel's Exhibit 5. The document is entitled "Employee Warning Notice." It indicates that it is the first notice and that it was issued on September 26, 1979. The "nature of violation" is described as being "absence from Dept." The "explanation of violation" is handwritten as follows: "Leaving his department and going into another department without permission."

Barrera stated, however, at the hearing that he was taking inventory on that particular night, and that he was not assigned to any specific department on that occasion. In taking the inventory, Barrera had to go from department to department that evening.

#### *B. The Grievance Filed by Barrera*

On October 2, 1979, Barrera filed a written grievance with the Union regarding the written warning which Supervisor Cadiz had given to him on the night of September 26, 1979. A copy of Barrera's grievance was introduced into evidence as General Counsel's Exhibit 6. The "nature of grievance" portion is written in Spanish. An interpreter at the hearing translated that portion of the grievance into English.

Subsequently, Jimenez informed Barrera that "they were going to fight the grievance after Bill Barton came back from his vacation and they were going to call me for a meeting and that they never did." That was the last thing that Barrera had heard about his grievance until the time of the hearing in this proceeding. Barrera testified during his cross-examination:

Q. Were you not aware that in November of 1979 the union had the warning slip removed from your record?

A. I never knew; they never did notify that; I asked Jose Torres and he said I know nothing about that.

Q. Is this the first time that you have heard that?

A. What?

Q. That in November of 1979 the union had the warning slip referred to removed from your record?

A. That is the first time I have heard it.

A meeting was held between the Company and the Union on November 11, 1979, at which time the grievance filed by Barrera was discussed. After discussion of the events which preceded the issuance of the warning to Barrera, the Company and the Union reached an agreement to withdraw the warning and to remove the warning notice from Barrera's personnel record. The meeting took place at the Hyatt House in the City of Commerce, California. Present for the Employer were Joseph Kay and Bill Barton. Present for the Union were Business Manager Scott, Jimenez, Jorge Astasio, and five unit employees on the Union's committee. The Union took the position that the warning was not justified because the conversation was very brief; Barrera was either on his way to the restroom or on his way from the restroom; the conversation was momentary and Barrera immediately returned to work without any instruction from a supervisor to do so. In the Union's view, according to Scott, "It wasn't the concern of the union who he was talking to; whether he or she was with the Labor Board or anything else. It was the circumstances of the events that the warning notice was given that the union felt was unjustified. It had nothing to do with who he was talking to."

#### *C. Conclusions*

Without repeating the facts which have already been set forth in sections III, A and B, herein, I conclude that the evidence shows that Calvente was engaged in union activities just prior to his termination by the Respondent. The fact that Calvente's actions were in the nature of a dissenting viewpoint, or negative in character, does not detract from the fact that his actions fall within the scope of union activities. He spoke out in opposition to the contract terms, which had been agreed on between the Employer and the Union. In particular, Calvente focused on the amount of the wage increase which he and the other unit employees would be earning for the next 3 years under the terms of the collective-bargaining agreement. It will be remembered that two representatives of the Respondent were present at the union meeting on August 11, 1979, at the union office. Thus, I conclude that the Respondent was aware of Calvente's outspoken opposition at that meeting to the contract terms which the Respondent had agreed on with the Union.

Next, Calvente initiated a petition to remove from office the Union's Chairman of the negotiating committee. Calvente did so at the Employer's facility, and he obtained between 18 and 20 signatures on his petition in one evening, on August 13, 1979. While Calvente's activities on that date took place at the Employer's plant, the evidence does not directly establish that the Employer's supervisors or management observed him doing so. However, the statements made by Cadiz to Calvente the next day on August 14, 1979, warrant an inference that Cadiz had knowledge from some source that Calvente was seeking to remove Jimenez from office. Note the events which took place in the supervisor's office and at Calvente's work station as described in section III,C,

herein. At the outset of that confrontation in the supervisor's office, Cadiz accused Calvente of bringing a book into the plant and of having "that book with [him] in order to get signatures to get Mr. Jimenez out of his office." Thus, that statement by Cadiz creates the impression that Cadiz was keeping Calvente's actions under surveillance, and his search of Calvente's work area for such a book reveals that the matter was one of concern to the Employer.

When the search failed to find a book seeking the removal of Jimenez from office, the conversation in the supervisor's office then turned to an accusation that Calvente had used some "bad words" towards a female employee. It will be remembered that the reason told to Calvente at the time of his termination was that he was being fired "for saying bad words." Nevertheless, Calvente was not confronted in person by Semental at that time, nor, more significantly, was Calvente confronted at the hearing by Semental since she did not testify. I conclude that this accusation is pretextual. Note in section III,C, that Calvente denied the insubordinate remark attributed to him by Feliciano at the hearing. Calvente's past warnings and his performance were not advanced at the time of his termination as the basis for the Respondent's decision to discharge Calvente.

After considering the foregoing, I conclude that the General Counsel has established a *prima facie* case of discrimination with regard to the termination of Calvente; and that the Respondent has not demonstrated that the discharge of Calvente would have taken place even in the absence of Calvente's union activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The General Counsel has presented evidence of union activities by Calvente just prior to his termination from 2 years of employment, the Employer's knowledge of his activities, and motivation on the part of the Employer to discriminate against Calvente because of his union activities. That the Respondent would have a vested interest in maintaining the validity of its new collective-bargaining agreement and the stability of its relationship with the Union is apparent. The Respondent's evidence does not rebut the General Counsel's *prima facie* case. Accordingly, I conclude that a preponderance of the evidence establishes that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by terminating Calvente and that the Respondent has independently violated Section 8(a)(1) of the Act by Cadiz' statements and conduct on August 14, 1979, as alleged in the General Counsel's complaint.

Based on the facts as set forth in section III, D, herein, I conclude that Calvente did attempt to file a grievance with the Union regarding his termination by the Employer. Regardless of whether Calvente actually filed a grievance or even failed to file a grievance concerning his termination, I conclude that a failure to pursue the grievance procedure does not preclude the processing of the General Counsel's complaint before the Board since the complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act in terminating Calvente. See the Board's Decision in *Roy Robinson, Inc., d/b/a Roy Robinson Chevrolet*, 228 NLRB 828 (1977), and *Gen-*

*eral American Transportation Corporation*, 228 NLRB 808 (1977).

Turning now to the allegations of the General Counsel's complaint which pertain to Barrera, I conclude that the evidence shows that the Respondent issued a written warning notice to Barrera on September 26, 1979, because Barrera spoke to a Board agent. As set forth in section IV,A, herein, Cadiz made it clear to Barrera at the time that the warning notice was issued "that it was definitely prohibited to talk to a government person." As described in section III herein, Cadiz had given his own affidavit to the female Board agent that same night at the plant with regard to the unfair labor practice charge based on the earlier termination of Calvente. Thus, Cadiz knew who the Board agent was at that time and the purpose of her investigation at the Employer's facility that evening.

While the warning notice accused Barrera of leaving his department that evening and without permission going into another department, Barrera was involved in taking an inventory on that particular night and, therefore, he was not assigned to a particular department but, instead, he had to go from department to department. That evidence underscores the pretextual nature of the reason given on the warning notice. Instead, I conclude that the warning was issued to Barrera because he spoke to a Board agent who was investigating unfair labor practice charges against the Employer.

In *N.L.R.B. v. Scrivener, d/b/a AA Electric Co.*, 405 U.S. 117, 121-123 (1972), the Supreme Court held:

1. Construing §8(a)(4) to protect the employee during the investigative stages, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section. Mr. Justice Black, in no uncertain terms, spelled out the congressional purpose:

"Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of §8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges" (citations omitted). *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967).

This complete freedom is necessary, it has been said, "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 89 U.S. App. D.C. 261, 263, 191 F.2d 483, 485 (1951). It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent "upon the initiative of individual persons." *Nash v. Florida Industrial Comm'n, supra*, 389 U.S., at

238; *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968).

2. The Act's reference in §8(a)(4) to an employee who "has filed charges or given testimony," could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly. On textual analysis alone, the presence of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee. This would be consistent with §8(a)(4)'s purpose and objective hereinabove described.

After considering the foregoing, I conclude that the Respondent independently violated Section 8(a)(1) of the Act by the statements made by Cadiz to Barrera on September 26, 1979, as alleged in the General Counsel's complaint, and that the Respondent also violated Section 8(a)(1) and (4) of the Act by issuing the warning notice to Barrera.

The Employer and the Union reached an agreement on November 11, 1979, to remove the warning notice from Barrera's records. That agreement was not revealed to Barrera until he testified on August 28, 1980, at the hearing in this proceeding. It would usually be appropriate to require that a respondent expunge from its records a warning notice which was found to have been issued in violation of the Act. See, for example, *American and Indo-China Development a/k/a Project Aid*, 240 NLRB 743 (1979). I will do that here to ensure that such records are expunged, as well as to provide for the Respondent's action to be communicated to its employees in an appropriate notice to them.

In prehearing pleadings, a question arose concerning the applicability of the Board's deferral policy as set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). It is unnecessary to discuss the several reasons why I conclude that *Spielberg* is not applicable here because the Board has stated in *Filmation Associates, Inc.*, 227 NLRB 1721 (1977), "[a]s we conclude that issues involving Section 8(a)(4) of the Act are solely within the Board's province to decide we will not apply the *Spielberg* doctrine to such issues."

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by the following acts and conduct:

(a) Creating the impression that Jose A. Calvente's union activities were being kept under surveillance by the Respondent; searching his work area and questioning him about his union activities on August 14, 1979.

(b) Telling Ever Salvador Barrera not to talk to an agent of the National Labor Relations Board and telling

him that a written warning was being issued to him for talking with a Board agent on September 26, 1979.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by terminating Jose A. Calvente on August 14, 1979, because of his union activities.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act by issuing a written warning to Ever Salvador Barrera on September 26, 1979, because he spoke with an agent of the National Labor Relations Board who was investigating an unfair labor practice charge which had been filed against the Respondent.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in those unfair labor practices.

I shall also recommend to the Board that the Respondent take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include an offer of immediate reinstatement to Jose A. Calvente or, if his former job no longer exists, to a substantially equivalent job, without the loss of his seniority or other rights and privileges. I shall also recommend to the Board that the Respondent make him whole for his losses which have resulted from his termination. Backpay, together with interest on such backpay amounts, will be computed in accordance with the Board's Decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As indicated previously in section IV, C, herein, I shall also recommend that any reference in the Respondent's records to the warning issued to Ever Salvador Barrera on September 26, 1979, be expunged from the Respondent's records and the warning rescinded.

Because the record reveals that a substantial number of the Respondent's employees speak Spanish, I shall also recommend to the Board that a translation of the official English language notice into the Spanish language be simultaneously posted alongside the notice. *Hasa Chemical, Inc.*, 235 NLRB 903 (1978).

Counsel for the General Counsel seeks to have a broad remedial order imposed on the Respondent. (See G.C. br. fn. 18.) In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the Board held that such a broad order "is warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." The record does not reveal that there have been any prior unfair labor practices committed by the Respondent. While the unfair labor practice violations in this case are serious, I conclude that the Board's standard stated in *Hickmott Foods* has not been met by the evi-

dence presented here. Accordingly, I shall deny the General Counsel's request.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>1</sup>

The Respondent, Art Steel of California, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Creating the impression that an employee's union activities are being kept under surveillance by the Respondent; searching an employee's work area and questioning an employee about his union activities.

(b) Telling an employee not to talk to an agent of the National Labor Relations Board and telling an employee that a written warning is being issued because an employee talked with a Board agent.

(c) Terminating an employee because of his union activities.

(d) Issuing a written warning to an employee because he spoke with an agent of the National Labor Relations Board who was investigating an unfair labor practice charge which had been filed against the Respondent.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by the Act.

2. Take the following affirmative action which is deemed to be necessary in order to effectuate the policies of the Act:

(a) Offer Jose A. Calvente immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position of employment, without the loss of his seniority or any other rights and privileges.

(b) Make whole Jose A. Calvente for his losses, with appropriate interest thereon, which have resulted from his termination by the Respondent. Such backpay and interest are to be computed as set forth in "The Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Expunge any reference in the Respondent's records to the written warning issued to Ever Salvador Barrera on September 26, 1979, and rescind that warning.

(e) Post at its Los Angeles, California, facility copies of the attached notice marked "Appendix."<sup>2</sup> Copies of

said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT create the impression that an employee's union activities are being kept under surveillance by us, search an employee's work area, and question an employee about his union activities.

WE WILL NOT issue a written warning to an employee because he spoke with an agent of the National Labor Relations Board who was investigating an unfair labor practice charge against our company.

WE WILL NOT tell an employee not to talk to an agent of the National Labor Relations Board, nor tell an employee that a written warning is being issued because the employee talked with a Board agent.

WE WILL NOT terminate an employee because of his union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer Jose A. Calvente immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position of employment without the loss of his seniority or any other rights and privileges.

WE WILL make whole Jose A. Calvente for his losses, with appropriate interest thereon, which have resulted from his termination.

WE WILL expunge from our records any reference to the written warning issued to Ever Salvador Barrera on September 26, 1979, and rescind that warning.

ART STEEL OF CALIFORNIA, INC.

<sup>1</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by